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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-704

JAMES ARTHUR JOHNSON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

JAMES ARTHUR JOHNSON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner James Arthur Johnson, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on October 11, 1972.

Opinion Below

The opinion of the court below, printed in Appendix B hereto, *infra*, p. 11, is not as yet reported.

Jurisdiction

The judgment of the court below was entered on October 11, 1972. It is printed in Appendix A hereto, *infra*, p. 10. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Question Presented

Did the trial judge's charge to the jury, that it was free to draw such inferences as it wishes from the Government's failure to call an informer who was favorably disposed to it, vitiate defense counsel's missing witness argument to an extent substantial enough to constitute reversible error?

Constitutional and Statutory Provisions Involved

There are no constitutional or statutory provisions involved in this case.

Statement of the Case

On August 31, 1971, a two-count indictment was returned against petitioner Johnson and two other defendants. Count one charged petitioner Johnson and one McGovern with selling counterfeit Federal Reserve notes in violation of 18 U.S.C. s. 473. Count two charged petitioner with conspiring with McGovern and one Campbell to sell counterfeit notes in violation of 18 U.S.C. s. 371. After a trial by a jury, all three defendants were found guilty as charged. (Appendix B hereto, *infra*, p. 11.)

At the trial, the evidence consisted principally of the testimony of Secret Service Special Agent Daniel Marchitello.[1] A summary of his testimony, taken from the opinion of the court below follows:

[1] Without the testimony of Marchitello, the Government had no case against any of the defendants. It is true that other agents testified that they observed Marchitello and a Government informer

On Friday, November 13, 1970, Special Agent Marchitello and Edward Callahan, a government informant, drove to a cafe in Charlestown, Massachusetts. They entered the cafe at 12:30 p.m. and found petitioner Johnson inside. Within Marchitello's hearing Callahan asked Johnson, "Have you got the stuff?" Johnson replied, "No. I haven't seen the guy but I'll have it for you tomorrow at approximately 12:30 p.m." Shortly thereafter Marchitello and Callahan left the cafe.

The next day Marchitello and Callahan returned to the cafe at approximately 12:30 p.m. Johnson, who was there, engaged Callahan in a brief private conversation. When Callahan welked back to Marchitello, he gave him three counterfeit $10 Federal Reserve notes which he said Johnson had just given him. Marchitello then left the cafe and returned to the car. A few minutes later Callahan and Campbell emerged from the cafe and approached Marchitello. Campbell told Marchitello that these couterfeit notes were very "hot" in Boston because they were being dipped in coffee to give them a used appearance and because merchants were detecting them as counterfeit because of the coffee smell. Campbell suggested that Marchitello use cigarette ashes and starch to age the bills. He said that the price would be $20 per hundred and promised a lower price if Marchitello purchased in large quantities. He then asked the agent how many notes he wished to buy. Marchitello told him that he wanted to purchase $2,000 in counterfeit bills and Campbell promised to have the consignment ready at 3 o'clock that afternoon.

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by the name of Callahan enter and leave the Charlestown Cafe in which the sale occurred, and saw each of the defendants enter, leave or stand in front of the cafe at one time or another. But that was not enough.

At approximately 3:05 p.m. Marchitello and Callahan returned to the cafe. They went in and sat down at the bar. Johnson and McGovern were present. After a brief conversation between Callahan, Johnson, and McGovern the latter approached Marchitello. He told him that the price would be $175 per thousand and asked Marchitello how much money he wanted to purchase. Marchitello said he wanted $2,000 in counterfeit currency and indicated that in the future he would place orders by calling the cafe and using the words "dresses or sweaters" to mean counterfeit money. McGovern agreed that the use of a code word was a good idea and said that he could be contacted by calling the cafe and asking for either himself or "Barney" (referring to Johnson). McGovern then walked over to Johnson and returned with a small brown paper bag. He told Marchitello that the bag contained $3,000 in counterfeit currency and again asked him how much currency he wanted. Marchitello told him $2,000. McGovern then removed one package of bills from the bag and handed the bag to Marchitello, whereupon the latter left the cafe and counted the bills. He discovered a shortage of $20, returned to the cafe, and told McGovern of this shortage. McGovern walked over to Johnson and returned with two more counterfeit $10 notes. Marchitello then paid McGovern $350.

McGovern then promised Marchitello a lower price in future transactions if he bought in larger quantities, and offered specially printed serial numbers if the agent bought $100,000 worth. Marchitello gave McGovern an undercover phone number at the New York Secret Service office where he could be reached and left the cafe.

Thereafter on approximately six other occasions from December 1970 through March 1971 Marchitello

called the Charlestown cafe. On each occasion he spoke to "Barney" (Johnson), and asked him whether any "sweaters" were available. Johnson said no "sweaters" were available and on one occasion stated that he had Marchitello's phone number and would call if any turned up. (Appendix B hereto, *infra*, pp. 12-14.)

In their closing arguments, defendants' counsel commented on the Government's failure to call Callahan as its witness, and asked the jury to infer that had Callahan been called as a witness, his testimony would have been "adverse to the prosecution's case" and would not have corroborated Special Agent Marchitello's testimony. (Appendix B hereto, *infra*, p. 17; 3(2) Tr. 11, 15, 26.)

The missing witness argument was so effective that at the conclusion of all arguments and before the trial judge's instructions to the jury, the prosecutor complained to the court that the jury will "think that the Government is suppressing something" and that "this will very badly damage the Government's case"; and he requested supplementary instructions to the effect that Callahan was equally available to both sides and that, therefore, the jury could draw such inferences from his failure to be called as a witness as they chose. (Appendix B hereto, *infra*, p. 17; 4 Tr. 2-4; Government's Supplementary Request for Instructions.)

In his final charge to the jury, the trial judge instructed them, subject to defendants' objection (4 Tr. 42), as follows:

> "During the course of the trial there has been some mention of an alleged informer by the name of Callahan. The defendants' counsel have argued to you that the jury should draw an inference from his absence that his testimony would be unfavorable to the government. There is evidence that Mr. Callahan is

currently in jail. I would, however, point out to the Jury that each of the defendants would have a right, as does the government, to compel or to ask the Court to compel the presence of Callahan as a defense witness. In other words, the defendants, as well as the government, have the right to compulsory process to obtain the presence of witnesses.

"I will leave it to you, having pointed this out, to draw such inferences as you wish, if any, as to what the absence of this witness shows or does not show with relation to the government's case.

"I would emphasize, however, that the defendants have no duty to present any evidence and the government has the duty of proving the case beyond a reasonable doubt." (4 Tr. 33, 34. Appendix B hereto, *infra*, p. 18.)

As indicated, the defendants were found guilty as charged. Petitioner was sentenced to be imprisoned for a period of five years on each count, the sentences to run concurrently, and his motion to stay execution and for continuance on bail pending appeal was denied. He filed seasonable notice of his appeal to the court below.

The court below affirmed the judgment of the district court, holding that although the court's instruction was wrong and "a more appropriate instruction would have spelled out Callahan's hostile disposition toward the defense, on balance we find the court's instruction to have been a neutral one which did not vitiate defense counsel's missing witness argument to an extent substantial enough to constitute reversible error." (Appendix B hereto, *infra*, p. 20.)

Reasons for Granting the Writ

Undoubtedly, there is a conflict in the different ways in which the various courts of appeal deal with the right

of a party to comment upon his opponent's failure to call a witness or to ask the jury to draw an adverse inference from such failure or with his right to an instruction informing the jury that an adverse inference may be drawn by it. *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968).

The Court of Appeals for the Second Circuit seems to consider the question as one of mere physical accessability of the witness. In its latest decision, that court has held that the failure to produce a witness equally available to both parties "is open to an inference against either party." *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2 Cir. 1968). Cf. *United States* v. *D'Angiolillo*, 340 F.2d 453, 457 (2 Cir.) *cert. denied*, 380 U.S. 955 (1965); and *United States* v. *LaRocca*, 224 F.2d 859 (2 Cir. 1955).

The Courts of Appeals for the Fourth and Eighth Circuits also seem to consider the issue to be one of physical accessability, but they take a view completely opposite to that of the Second Circuit. They hold that if the witness is equally available no unfavorable inference "flows from the failure of a party to call such a witness." *Johnson* v. *United States*, 291 F.2d 150, 154 (8 Cir. 1961); *United States* v. *Chase*, 372 F.2d 453, 467 (4 Cir. 1967).

The court below, following the Courts of Appeals for the Third, Fifth, Sixth and Ninth Circuits,[2] [*United States* v. *Jackson*, 257 F.2d 41, 43-44 (3 Cir. 1958); *McClanahan* v. *United States*, 230 F.2d 919, 925-926 (5 Cir.), *cert. denied*, 352 U.S. 824 (1956); *Morei* v. *United States*, 127 F.2d 827, 830 (6 Cir. 1942); *Samish* v. *United States*, 223 F.2d 358, 365 (9 Cir.) *cert. denied*, 350 U.S. 848 (1955)], refused to consider the question as one of mere physical availablility, holding:

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[2] The Court of Appeals for the District of Columbia has adopted a rather unique procedure for the missing witness rule.

> ". . . A witness's availability is not to be decided on the basis of his physical presence in the court room or his accessability by writ of habeas corpus or by subpoena . . . . (A) witness's practical and legal availability is to be determined on the basis of his disposition and relationship toward the parties . . . . Where the court finds that an uncalled witness is clearly favorably disposed toward one of the parties, an instruction, if requested, may properly be given that the jury may draw an inference favorable to the other party . . . ."

In the *Morei* and *Jackson* cases, both of which are on all fours factually with the instant case, each court held that the Government's failure to call an informer, who was a witness to the crime, gave rise to a strong inference against the Government. In *Jackson*, the court said:

> ". . . His (the informer's) presence was a natural part of the Government's case and certainly he was not the kind of witness that the defendant could be expected to call. We think that clearly his absence was a subject of proper and vigorous comment on the part of defense counsel . . . . To deny him the privilege of bringing this very telling point to the jury deprived him of a substantial right." 257 F.2d 41, 44.

It is true that the trial judge in the instant case, unlike the trial judge in the *Jackson* case, did not stop the missing witness comment of defense counsel. But what he did was, it seems to petitioner Johnson, even more prejudicial. He effectively undercut the very telling point which they had made to the jury by erroneously singling out the physical accessibility of Callahan to the defendants as well as to the Government and by ignoring Callahan's relationship to the Government from which he would naturally be ex-

pected to favor the prosecution. By instructing the jury that they might draw such inferences as they wished "as to what the absence of this witness does or does not show with relationship to the Government's case", the trial judge was following the missing witness rule of the Second Circuit. *United States* v. *D'Angiolillo*, 340 F.2d 453, 457 (2 Cir.) *cert. denied*, 380 U.S. 955 (1965).

While acknowledging that "a more appropriate instruction would have spelled out Callahan's hostile disposition toward the defense," the court below found "on balance . . . the court's instruction to have been a neutral one." (Appendix B hereto, *infra*, p. 20.) But here, because petitioner was the one witness who could have corroborated Special Agent Marchitello's testimony directly, petitioner was entitled to something more than a "neutral" instruction. He was entitled either to an instruction that the jury may draw an inference adverse to the Government from the Government's failure to call Callahan as its witness or to true neutrality, that is, silence on the part of the trial judge.

Because "there is a split of authority" not only as to what the missing witness rule is, *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2 Cir. 1968), but also as to its application, petitioner believes that the conflict should be resolved definitively by this court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1108

UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES ARTHUR JOHNSON,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: October 11, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk

[cc: MESSRS. KATZ AND HAMMOND.]

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 72-1108

UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES ARTHUR JOHNSON,
DEFENDANT, APPELLANT.

No. 72-1109

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOHN P. CAMPBELL,
DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*, and
HAMLEY,* *Senior Circuit Judge*.

Manuel Katz, with whom *Paul T. Smith* was on brief, for James Arthur Johnson, appellant.
Lawrence F. O'Donnell, with whom *Francis X. Aylward* was on brief, for John P. Campbell, appellant.
Henry H. Hammond, Assistant United States Attorney, with whom *Joseph L. Tauro*, United States Attorney, was on brief, for appellee.

October 11, 1972.

McENTEE, *Circuit Judge*. These are appeals from two convictions entered upon a two count indictment for selling

*Of the Ninth Circuit, sitting by designation.

and conspiring to sell counterfeit currency. Count I of the indictment charged appellant Johnson and one McGovern with selling counterfeit Federal Reserve notes in violation of 18 U.S.C. § 473 (1970).[1] Count II charged appellant Campbell with conspiring with Johnson and McGovern to sell counterfeit notes in violation of 18 U.S.C. § 371 (1970). After trial by a jury all three defendants were found guilty as charged. Only Johnson and Campbell appeal.

On Friday, November 13, 1970, Secret Service Special Agent Daniel Marchitello and Edward Callahan, a government informant, drove to a cafe in Charlestown, Massachusetts. They entered the cafe at 12:30 p.m. and found appellant Johnson inside. Within Marchitello's hearing Callahan asked Johnson, "Have you got the stuff?" Johnson replied, "No. I haven't seen the guy but I'll have it for you tomorrow at approximately 12:30 p.m." Shortly thereafter Marchitello and Callahan left the cafe.

The next day Marchitello and Callahan returned to the cafe at approximately 12:30 p.m. Johnson, who was there, engaged Callahan in a brief private conversation. When Callahan walked back to Marchitello, he gave him three counterfeit $10 Federal Reserve notes which he said Johnson had just given him. Marchitello then left the cafe and returned to the car. A few minutes later Callahan and Campbell emerged from the cafe and approached Marchitello. Campbell told Marchitello that these counterfeit notes were very "hot" in Boston because they were being dipped in coffee to give them a used appearance and because merchants were detecting them as counterfeit because

[1] 18 U.S.C. § 473 provides, "Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

of the coffee smell. Campbell suggested that Marchitello use cigarette ashes and starch to age the bills. He said that the price would be $20 per hundred and promised a lower price if Marchitello purchased in large quantities. He then asked the agent how many notes he wished to buy. Marchitello told him that he wanted to purchase $2,000 in counterfeit bills and Campbell promised to have the consignment ready at 3 o'clock that afternoon.

At approximately 3:05 p.m. Marchitello and Callahan returned to the cafe. They went in and sat down at the bar. Johnson and McGovern were present. After a brief conversation between Callahan, Johnson, and McGovern the latter approached Marchitello. He told him that the price would be $175 per thousand and asked Marchitello how much money he wanted to purchase. Marchitello said he wanted $2,000 in counterfeit currency and indicated that in the future he would place orders by calling the cafe and using the words "dresses or sweaters" to mean counterfeit money. McGovern agreed that the use of a code word was a good idea and said that he could be contacted by calling the cafe and asking for either himself or "Barney" (referring to Johnson). McGovern then walked over to Johnson and returned with a small brown paper bag. He told Marchitello that the bag contained $3,000 in counterfeit currency and again asked him how much currency he wanted. Marchitello told him $2,000. McGovern then removed one package of bills from the bag and handed the bag to Marchitello, whereupon the latter left the cafe and counted the bills. He discovered a shortage of $20, returned to the cafe, and told McGovern of this shortage. McGovern walked over to Johnson and returned with two more counterfeit $10 notes. Marchitello then paid McGovern $350.

McGovern then promised Marchitello a lower price in future transactions if he bought in larger quantities, and offered specially printed serial numbers if the agent bought

$100,000 worth. Marchitello gave McGovern an undercover phone number at the New York Secret Service office where he could be reached and left the cafe.

Thereafter on approximately six other occasions from December 1970 through March 1971 Marchitello called the Charlestown cafe. On each occasion he spoke to "Barney" (Johnson), and asked him whether any "sweaters" were available. Johnson said no "sweaters" were available and on one occasion stated that he had Marchitello's phone number and would call if any turned up.

At the close of the government's case all of the defendants rested and moved for judgment of acquittal on both counts. The court denied these motions and submitted the case to the jury. The defendants were found guilty as charged.

On appeal Johnson urges three grounds on which his convictions should be overturned. He argues first that the trial court erred in admitting into evidence without any limiting instructions hearsay declarations of his codefendants, second that the evidence was insufficient to warrant sending the case to the jury, and third that the trial court erred in instructing the jury with respect to the government's failure to call the informant Callahan as a witness. Campbell attacks his conviction on the latter two grounds raised by Johnson.

Specifically Johnson first argues that the jury may not consider statements made by his codefendant in his absence against him unless there is independent evidence offered which establishes that in fact Johnson was an active participant in the alleged conspiracy. He raises this contention with regard to the admission of Marchitello's conversation with Campbell in the early afternoon of November 14, 1970, and with regard to Marchitello's conversation with McGovern in the cafe later that same afternoon. The record demonstrates that Campbell's remarks were admitted with-

out limiting instructions and that while the court initially gave the limiting instructions with regard to McGovern's conversation, it later reversed itself and told the jury that it might consider this conversation with respect to all of the defendants. For reasons stated below, we find this contention without merit as to both conversations.

Little need be said with regard to the admission of Marchitello's conversation with Campbell without limiting instructions because this evidence could not possibly have been prejudicial to Johnson. The latter was neither mentioned nor referred to in any manner in this conversation, nor did he raise any objection to the admission of this testimony at trial.

The admission of Marchitello's conversation with McGovern without limiting instructions was also proper. The declaration is one co-conspirator is inadmissible against a second alleged co-conspirator who was not present when the declaration was made, absent independent proof that the second co-conspirator is connected with the conspiracy. *Glasser* v. *United States,* 315 U.S. 60, 74 (1942). Once such independent evidence of participation in the conspiracy has been established, however, the hearsay declaration becomes admissible against the alleged co-conspirator. *Gorin* v. *United States,* 313 F.2d 641, 651 (1st Cir.), *cert. denied,* 379 U.S. 971 (1965). Discretion is vested in the trial court to determine whether sufficient credible independent evidence has been offered to render the hearsay declarations admissible. The independent evidence need not establish the alleged co-conspirator's participation beyond a reasonable doubt. Such statements are admissible if the trial court finds the independent evidence credible and sufficient to support a finding of concerted action. *United States* v. *Ragland,* 375 F.2d 471, 477 (2d Cir.), *cert. denied,* 390 U.S. 925 (1968).

We find ample independent evidence in the record to

support the court's conclusion that Johnson was a participant in the conspiracy and thus to render McGovern's declarations admissible as to Johnson. Johnson promised on November 13, 1970, to have the "stuff" ready the next day about 12:30 p.m. When Marchitello and Callahan returned to the cafe at that time, Callahan delivered three counterfeit $10 notes to Marchitello after a short conversation with Johnson. Also, after the initial transaction on November 14, 1970, Marchitello and Johnson spoke to each other several times by phone and discussed counterfeit money using the code word "sweaters." We note, however, that Marchitello proposed the use of this code word to McGovern only. During one of these calls Johnson also said that he had Marchitello's New York phone number. Here, also, it is to be noted that Marchitello had given this phone number to McGovern only. These circumstances provide sufficient independent evidence of Johnson's participation in the conspiracy to render McGovern's declarations admissible against Johnson.

Appellants' contention that the evidence was insufficient to warrant sending the case to the jury is without merit. The record demonstrates with regard to Johnson that his opening remark to Marchitello and Callahan on November 13 initiated the events of November 14; that Callahan gave Marchitello three sample counterfeit notes after a brief private conversation between himself and Johnson; that Callahan told Marchitello that Johnson had just given him these three notes; that McGovern walked over to Johnson and then returned carrying a paper bag containing counterfeit money; that after being told of the $20 shortage, McGovern walked over to Johnson and returned with two additional counterfeit notes; and finally, that Marchitello telephoned and discussed with Johnson a number of times the possible purchase of additional counterfeit money (using the code word "sweaters").

With regard to Campbell, the record shows that on November 14, 1970, he told Marchitello that the counterfeit notes were very "hot" in Boston because they were being dipped in coffee to age them; that Marchitello should age them by rolling them in ashes and pouring starch over them; that the price would be $20 per hundred, but would be lower if Marchitello purchased larger quantities; and that he would have Marchitello's consignment of counterfeit notes ready for him at 3 p.m. that same afternoon.

Viewing these facts in the light most favorable to the government, *Parker* v. *United States,* 378 F.2d 641, 644-45 (1st Cir.), *cert. denied sub nom. Perma-Home Corp.* v. *United States,* 389 U.S. 842 (1967), we find the facts to be more than sufficient to support the court's decision to submit both counts to the jury.

Appellants' final contention that the court erred in its instructions to the jury with regard to the government's failure to call informant Callahan as a witness is equally without merit. In closing argument counsel for each defendant urged the jury that it might infer from the government's failure to call Callahan that his testimony would have been unfavorable to the government's case. In response, the prosecution requested supplementary instructions to the effect that Callahan was equally available to both sides and that the jury could draw whatever inferences it chose from the government's failure to call him. The record indicates that throughout the trial Callahan was incarcerated in Massachusetts and that while the government attorney had informed defense counsel at least one month before trial and again on the first day of trial that he would not be called as a government witness, defense counsel made no attempt to have him produced.

On these facts the court instructed the jury as follows:

> "During the course of the trial there has been some mention of an alleged informer by the name of Callahan. The defendants' counsel have argued to you that the jury should draw an inference from his absence that his testimony would be unfavorable to the government. There is evidence that Mr. Callahan is currently in jail. I would, however, point out to the Jury that each of the defendants would have a right, as does the government, to compel or to ask the Court to compel the presence of Callahan as a defense witness. In other words, the defendants, as well as the government have the right to compulsory process to obtain the presence of witnesses.
>
> "I will leave it to you, having pointed this out, to draw such inferences as you wish, if any, as to what the absence of this witness shows or does not show with relation to the government's case.
>
> "I would emphasize, however, that the defendants have no duty to present any evidence and the government has the duty of proving the case beyond a reasonable doubt."

The basis for either argumentative comments or requests for instructions with regard to an opponent's failure to call a knowledgeable witness is the simple proposition that if a party has evidence which will illuminate questions in issue and fails to present it, it may be inferred that such evidence would be harmful to his case. 2 Wigmore on Evidence § 285 (3d ed. 1940). No inference is permissible, however, where the unpresented evidence would be merely cumulative, *United States* v. *Llamas,* 280 F.2d 392, 393-94 (2d Cir. 1960), or where the evidence is equally available to either party. *See Graves* v. *United States,* 150 U.S. 118, 121 (1893).

It is the government's position that because Callahan was in jail in Massachusetts throughout the trial he was equally available to both parties. Citing *United States* v. *D'Angiolillo,* 340 F.2d 453 (2d Cir.), *cert. denied,* 380 U.S. 955 (1965) and *United States* v. *LaRocca,* 224 F.2d 859 (2d Cir. 1955), the government argues that no inference may be drawn against it for its failure to call the informant. We refuse to accept this proposition. A witness's availability is not to be decided on the basis of his physical presence in the court room or his accessability by writ of habeas corpus or by subpoena. We hold rather that a witness's practical and legal availability is to be determined on the basis of his disposition and relationship toward the parties. McCormick, Law of Evidence § 249, at 534 (1954). *See, e.g., United States* v. *Jackson,* 257 F.2d 41, 43-44 (3d Cir. 1958); *McClanahan* v. *United States,* 230 F.2d 919, 925-26 (5th Cir.), *cert. denied,* 352 U.S. 824 (1956); *Samish* v. *United States,* 223 F.2d 358, 365 (9th Cir.), *cert. denied,* 350 U.S. 848 (1955); *United States* v. *Beekman,* 155 F.2d 580, 584 (2d Cir. 1946). Where the court finds that an uncalled witness is clearly favorably disposed toward one of the parties, an instruction, if requested, may properly be given that the jury may draw an inference favorable to the other party, *Llamas, supra.* In those cases where the bias or disposition of an uncalled witness is not able to be ascertained, "the failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances." (Emphasis deleted.) 2 Wigmore on Evidence § 288, at 171 (3d ed. 1940).

Our endorsement of these principles, however, does not require the reversal of the convictions below. Here the court's instructions left the jury free to draw what inferences it might from the government's failure to call

Callahan. The fact that the instruction pointed out that Callahan could have been made available to be called by the defense is offset to some degree by the emphasis in the instruction on drawing inferences "with relation to the government's case." While a more appropriate instruction would have spelled out Callahan's hostile disposition toward the defense, on balance we find the court's instruction to have been a neutral one which did not vitiate defense counsel's missing witness argument to an extent substantial enough to constitute reversible error.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-704

JAMES ARTHUR JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of selling counterfeit currency, in violation of 18 U.S.C. 473, and of conspiring to sell such currency, in violation of 18 U.S.C. 371.[1] He was sentenced to two concurrent five year terms of imprisonment. The court of appeals affirmed (Pet. App. B).

1. The evidence is detailed in the opinion below. It showed that secret service agent Daniel Marchitello, with the assistance of an informant, Edward Callahan, purchased a quantity of counterfeit currency from petitioner and his two co-defendants.

[1] One of petitioner's co-defendants was also found guilty on both counts; another was convicted on the conspiracy charge only.

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Callahan, who was by then in prison (Tr. I 24), was not called as a witness by the government; the government's case was principally based upon the testimony of Marchitello. The United States Attorney disclosed to petitioner one month before the trial and again on the day trial began that Callahan would not be used as a prosecution witness (Tr. I 6–7). Petitioner did not seek to call the informer as a hostile witness, although the trial judge indicated a willingness to have him produced if petitioner so desired (Tr. V 7–8). During cross-examination, prosecution witnesses—particularly Marchitello—were frequently asked if Callahan would be called to the stand, what his past record was, where he was then located, and whether any promises had been made to him in return for his services (Tr. I 23–24, 106–109, 127–128, 134; Tr. II 27–30, 40, 58–59, 63–64). During closing arguments, all three defense counsel commented on Callahan's absence. Petitioner's attorney stated: "The only person who hasn't come forth at this trial is Mr. Callahan. Mr. Callahan, he alone could corroborate what the agent said, but he is not here. I know why he isn't here. I assume I know why he isn't here. It is up to you to make whatever assumptions you wish to make from the evidence" (Tr. IV 11). At the prosecution's request, the trial judge instructed the jury that the defense had the right to subpoena Callahan as a witness, and specifically left it up to the jury to draw what inferences they wished from his absence. At the same time, the judge emphasized that the de-

fendant had no duty to present any evidence, while the government was required to prove its case beyond a reasonable doubt.[2]

Petitioner argues that in giving this instruction the court committed prejudicial error. The court below, however, properly rejected this contention. If a party has it peculiarly within his power to produce a witness whose testimony would be highly relevant, and fails to do so, the inference naturally arises that the testimony of the individual would be unfavorable to that party. *Graves* v. *United States,* 150 U.S. 118, 121. See also McCormick, *Evidence* 534; II Wigmore, *Evidence* 285 (3rd ed.). However, if a witness is equally available to both sides, courts hold either that no

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[2] The trial court's full instruction in this regard is as follows:

During the course of the trial there has been some mention of an alleged informer by the name of Callahan. The defendants' counsel have argued to you that the jury should draw an inference from his absence that his testimony would be unfavorable to the Government. There is evidence that Mr. Callahan is currently in jail. I would, however, point out to the Jury that each of the defendants would have a right, as does the government, to compel or to ask the Court to compel the presence of Callahan as a defense witness. In other words, the defendants, as well as the government, have the right to compulsory process to obtain the presence of witnesses.

I will leave it to you, having pointed this out, to draw such inferences as you wish, if any, as to what the absence of this witness shows or does not show with relation to the government's case.

I would emphasize, however, that the defendants have no duty to present any evidence and the government has the duty of proving the case beyond a reasonable doubt [Tr. V 33-34].

inference arises [3] or that the failure to produce is open to an inference against either party.[4] There is an apparent difference among the circuits as to whether informants and police agents, although physically accessible to both sides as potential witnesses, are for these purposes equally available to both sides, or whether they are "peculiarly within the power" of the prosecution whose failure to produce them gives rise to the inference that their testimony would be unfavorable to the prosecution.[5]

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[3] See *United States* v. *Currier*, 454 F. 2d 835 (C.A. 1); *United States* v. *Meisch*, 370 F. 2d 768 (C.A. 3); *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4); *United States* v. *Chapman*, 435 F. 2d 1245 (C.A. 5); *United States* v. *Waller*, 422 F. 2d 1202 (C.A. 7); *Johnson* v. *United States*, 291 F. 2d 150 (C.A. 8); *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9).

[4] See *United States* v. *Deutsch*, 451 F. 2d 98 (C.A. 2).

[5] Some courts indicate that the legal availability of a witness depends upon his disposition and relationship to the parties and thus consider informants and police agents not to be equally available to the defense even though they are physically accessible. See *United States* v. *Jackson*, 257 F. 2d 41 (C.A. 3); *Burgess* v. *United States*, 440 F. 2d 226 (C.A. D.C.); *Morei* v. *United States*, 127 F. 2d 827 (C.A. 6). Others perceive such individuals to be available to either side if they are physically accessible to subpoena. See *United States* v. *Tant*, 412 F. 2d 840 (C.A. 5); *Margoles* v. *United States*, 402 F. 2d 450 (C.A. 7); *United States* v. *Waller*, 422 F. 2d 1202 (C.A. 7); *Arellanes* v. *United States*, 302 F. 2d 603 (C.A. 9).

Although the language in these cases is certainly inconsistent, the varying factual and procedural contexts in which the question arises may account for much of this inconsistency. Thus, in the *Waller* case, the informant was present at trial, and had indicated his readiness to take the stand if called by the defendant. In *Arellanes* and *Margoles* the defendants apparently were urging the courts to permit the inference—which, on far different facts, the court in *Morei* apparently did. *Tant* rests primarily on the fact that the absent informant's testimony would have been cumulative. In the *Burgess* case the question is thoroughly considered; Judge

However, this is not an appropriate case in which to resolve any differences which may exist among the lower courts concerning the application of the missing witness rule, for the court of appeals here stated its approval of the rule advocated by petitioner. The court below stated that:

> * * * A witness's availability is not to be decided on the basis of his physical presence in the courtroom or his accessability by writ of habeas corpus or by subpoena. We hold rather a witness's practical and legal availability is to be determined on the basis of his disposition and relationship toward the parties [citations omitted]. Where the court finds that an uncalled witness is clearly favorably disposed toward one of the parties, an instruction, if requested, may properly be given that the jury may draw an inference favorable to the other party [Pet. App. B 19].

This interpretation is more favorable to a defendant than the opposing view which defines availability merely on the basis of physical accessibility and which, in petitioner's case, would give rise either to no inference or would be open to an inference against either party.

The only real issue that petitioner can raise is whether the court below properly decided that in the particular circumstances of this case, "[w]hile a more appropriate instruction would have spelled out Callahan's disposition toward the defense, * * * we find

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Fahy concludes that the trial court must initially determine from all the facts of the case whether the absent witness was so important to the prosecution's case that the inference would be reasonable. If so, the court should instruct the jury that they have the right to draw the adverse inference.

the court's instruction to have been a neutral one which did not vitiate defense counsel's missing witness argument to an extent substantial enough to constitute reversible error" (Pet. App. B 20). Petitioner, it should be emphasized, did not request an instruction that would have more expressly clarified to the jury Callahan's relationship to the government.[6] Moreover, during trial the court gave all three defense counsel free rein to refer adversely to Callahan's absence and, in closing argument, it did not interfere with the exhortation of a co-defendant's attorney that the jury should infer that the absence indicated that Callahan would have testified unfavorably to the government.[7] In these circumstances, the court below correctly concluded that no reversible error was committed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[6] See Tr. V 2–8, where, after the trial court indicated that it would accept the government's supplemental instruction on the defendants' right to subpoena Callahan, the only objection was raised by one of the co-defendant's attorneys who requested that the court add to the supplemental instruction the caveat that the government still had to prove defendants' guilt beyond a reasonable doubt and that the defense was under no obligation to produce any evidence. This was accepted by the court (Tr. V 33–34).

[7] The petitioner's reliance on *United States* v. *Jackson*, 257 F. 2d 41 (C.A. 3), and *Morei* v. *United States*, 127 F. 2d 827 (C.A. 6), is misplaced. Neither of those cases involved a challenge to a jury instruction. In *Morei*, the court reversed because of entrapment, and in analyzing the evidence, cited the inference as an aid to its own determination. In *Jackson*, the defense was denied the right to argue the inference to the jury.

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